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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 19

THE UNITED STATES OF AMERICA, Appellant,

versus

SHREVEPORT GRAIN & ELEVATOR COMPANY.

On Appeal from the District Court of the United States for the Western District of Louisiana.

BRIEF FOR SHREVEPORT GRAIN AND ELEVATOR COMPANY.

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BRIEF FOR SHREVEPORT GRAIN AND ELEVATOR COMPANY.

A statement of the case is contained on pages two and three of the Government's brief.

Summary of Argument.

The Act here in question is invalid and unconstitutional because it fails to define with the requisite certainty

the offense thereby denounced. It therefore conflicts with Articles 5 and 6 of the Amendments to the Constitution, in that it operates to deprive persons protected by the Constitution of their liberty and their property without due process of law, and ignores the constitutional right of the accused to be informed of the nature and cause of the accusation. *United States v. Cohen Grocery Company, 255 U. S. 81; United States v. Reese, 92 U. S. 214; United States v. Brewer, 139 U. S. 278; Todd v. United States, 154 U. S. 282; Cline v. Frink Dairy Company, 274 U. S. 445; Connally v. General Construction Company, 269 U. S. 385; Champlain Refining Company v. Commission, 286 U. S. 210; Smith v. Cahoon, 283 U. S. 533; Small Company v. American Sugar Refining Company, 267 U. S. 233; Yu Cong Eng v. Trinidad, 271 U. S. 500.* The infirmity of the Act is not cured by departmental regulations. *United States v. United Verde Copper Co., 196 U. S. 205; Morrill, Collector, v. Jones, 106 U. S. 466; United States v. Eaton, 144 U. S. 677; Williamson v. United States, 207 U. S. 426; Burnet, Commissioner, v. Chicago Portrait Co., 286 U. S. —.* The Act likewise is in conflict with Articles 1, 2 and 3 of the Constitution which separate the Government into legislative, executive and judicial branches, in that it attempts to confer legislative powers upon the executive department and the courts. *United States v. Reese, 92 U.S. 214; Cline v. Frink Dairy Co., 274 U. S. 445; United States v. United Verde Copper Co., 196 U. S. 205; Morrill, Collector, v. Jones, 106 U. S. 466; United States v. Eaton, 144 U. S. 677.* Under the Criminal Appeals Act, this Court will review only the particular point passed upon by the court below. The Government cannot change its theory of the case and present for the first time in this court ques-

tions which were not submitted to or passed upon by the District Court, and which have not been made the subject of any specific assignment of error. *United States v. Stevenson, 215 U. S. 194.*

ARGUMENT.

I. The Statute does not Validly Define a Criminal Offense, and by Reason of its Uncertainty is Invalid under the Fifth and Sixth Amendments.

At the outset we desire to emphasize that we are considering this statute in its aspect as legislation creating a criminal offense and providing for its punishment, as distinguished from the appropriate civil remedies available under the Act. In this aspect, the numerous cases which have been decided treating of enforcement of the Act through the civil process of the courts are not applicable. The cases cited in the Government's brief dealing with civil proceedings likewise may be distinguished on this ground. *Levy Leasing Company vs. Siegel, 258 U. S. 241, 250.*

This prosecution is laid under the third paragraph of Section 8 of the Food and Drugs Act of 30th June, 1906, as amended, which relates to misbranding, and provides that an article of food shall be construed to be misbranded—

> "Third. If in package form, the quantity and the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure or numerical count; provided however, that reasonable variations shall be permitted, and tolerances and also exemptions as to small

packages shall be established by rules and regulations made in accordance with the provisions of Section 3 of this Act."

By Section Three of the Act it is provided that the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of the Act.

The language of the Act as quoted is in substance a prohibition that there shall be any unreasonable variation in the weight, measure or numerical count of the quantity and contents of any package from that marked on the outside of the package. Reasonable variations are lawful; unreasonable variations are forbidden.

It is respectfully submitted that the language of the statute fixes no ascertainable standard of guilt and is too indefinite and uncertain to afford a valid definition of a crime.

An authoritative expression upon the question of the certainty with which crimes must be defined by acts of Congress is contained in *United States v. Cohen Grocery Company, 255 U. S. page 81.* The case involved a prosecution under the Lever Food Control Act which made it an offense, among other things, to "make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries * * * ." The Cohen Grocery Company was alleged to have made an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, namely, sugar, by having made a sale of 50 pounds of

sugar for $10.17, and having made a sale of a 100 pound bag of sugar for $19.50. The defendant demurred to the indictment on the ground, among others, that the indictment was so vague as not to inform the accused of the nature and cause of the accusation and that the statute upon which the indictment was based was subject to the same infirmity because it was so indefinite as not to enable it to be known what was forbidden, and therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable. The Court, in an opinion rendered by Chief Justice White, held that this contention was correct and that the Act, insofar as applied to the defendant in that case, was unconstitutional and void. The language of Chief Justice White on this point is as follows:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the test in question; that is, whether the words 'that it is hereby made unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted the fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not we are of the opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against. In fact we see no reason to doubt the soundness of the

observation of the court below in its opinion to the effect that to attempt to enforce this section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

The language of the Lever Act making it unlawful for any person wilfully to make any "unjust or unreasonable rate or charge" is indistinguishable in substance from the language of the Food and Drug Act above quoted, prohibiting unreasonable variations in weight, measure or count from that marked on the outside of the package. The test under the Lever Act was whether the rate or charge was reasonable. The test under the Pure Food and Drug Act is whether the variation is reasonable.

In *United States v. Reese, 92 U. S., p. 214*, a prosecution was had under the Act of Congress of May 31, 1870, passed under authority of the 15th amendment to protect the recently enfranchised colored people in the exercise of the right of suffrage. Certain election officials of the State of Kentucky were indicted for having violated the provisions of the act. The opinion in the case was written by Mr. Chief Justice Waite who, in examining the provisions of the act relied upon by the Government to sustain the prosecution, held such provisions to be insufficient and affirmed the judgment of the Circuit Court which had sustained demurrers to the indictments. During the course of the opinion Chief Justice Waite said:

"Penal statutes ought not to be expressed in language so uncertain. If the Legislature undertakes to define by statute a new offense and provide

for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

At another point in the opinion the Chief Justice remarked:

"It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and find who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the Government. The courts enforce the legislative will when ascertained if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts, but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and, when called upon in due course of legal proceedings, must annul its encroachments upon the reserve power of the states and the people."

In *United States v. Brewer, 139 U. S. 278, 35 L. Ed. 191*, it is said:

"Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. Before a man can be punished his case must be plainly and unmistakably within the statute."

To the same effect is *Todd v. United States, 154 U. S. 282*, which involved a prosecution under an act penalizing the intimidation or threatening of witnesses "in any court of the United States." The accused was indicted for having conspired to threaten and injure certain witnesses who had been called to give testimony in a preliminary ex-

amination before a United States Commissioner. The Court held that the indictment was defective for the reason that the United States Commissioner was not a court of the United States within the meaning of the statute and, in the course of its opinion, said:

> "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment and that no act however wrongful can be punished under a statute unless clearly within its terms."

In the case of *Cline v. Frink Dairy Company, 274 U. S. 445*, the constitutionality of the anti-trust law of the State of Colorado was involved. The act was framed in a way similar to the one here under consideration. In the first five paragraphs of section one of the act, the Legislature defined conspiracies and combinations which should be unlawful. But the act there, as here, went further and contained a proviso to the effect that no agreement or association should be deemed to be unlawful or within the provisions of the law, the objects and purposes of which were to conduct operations at a reasonable profit or to market at a reasonable profit those products which could not otherwise be so marketed. This Court held the act to be invalid, saying:

> "Such an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused. And attempts to enforce the section will be to penalize and punish all combinations in restraint of trade in a commodity when, in the judgment of the court and jury, they are not necessary to enable those engaged in it to make it reasonably profitable, but not otherwise. Such a basis for judgment of a crime would be more impracticable and complicated

than the much simpler question in the L. Cohen Grocery Company case, whether a price charged was unreasonable or excessive. The real issue which the proviso would submit to the jury would be legislative, not judicial. * * *."

In *Connally v. General Construction Company, 269 U. S. 385*, this Court quoted with approval from the case of *United States v. Capitol Traction Company, 34 App. (D. C.) 592*, as follows:

"* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different construction. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one construction of the requirement and the court upon another."

The principle of the foregoing authorities was again approved in the recent case of *Champlin Refining Company v. Commission, 286 U. S. 210, 243*, the Court saying:

"It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."

Compare, also, *Smith v. Cahoon, 283 U. S. 553, 564; Small Company v. American Sugar Refining Co., 267 U. S. 233, 239; Yu Cong Eng v. Trinidad, 271 U. S. 500.*

The cited cases establish that in criminal statutes it is necessary that the Legislature draw a line clearly distinguishing between what is permissible and what is forbidden. The fundamental defect in the statute under consideration is that no such line is drawn. The Government apparently contends in its brief that the line comprehends and requires exact correspondence between the weight of the package and the recitals upon the label. This is a departure from its theory as presented to the court below, where it was conceded that it was the function of the jury to determine the reasonableness of the variation in any given case.(1) But the answer to this argument is that the statute in plain language expressly negatives the idea now advanced by providing that variations from this line shall be allowed. The fact of variation between contents and label, therefore, does not of itself involve a violation of the statute. The line sought to be established by the statute is in some obscure zone above or below the marked contents where the discrepancy may have gone beyond a point which the jury in any given case may think reasonable. It is obvious that different juries may entertain widely divergent views on this point. In the case at bar, the charge is made in Count 1 of the Indictment that sacks of cornmeal, labeled "96 pounds net," contained some 20 ounces less than 96 pounds. This variation is less than 2%. In contrast, reference may be made to the case of

(1) In the Government's brief in the District Court, the following statement is made: "Thus by showing the amount of the variation it is made apparent on the face of the information that we are dealing with such substantial variations as to make the determination as to their reasonableness or unreasonableness a proper question for the jury."

Burns Baking Company v. Bryan, 264 U. S. 503, which involved a statute of the State of Nebraska regulating the permissible variations in respect of loaves of bread. The statutory margin of tolerance was two ounces to the pound, or 12½%. This Court held that the variation allowed by the statute was too narrow, and set aside the Act as arbitrary and oppressive. Moreover, as we read the Government's brief (page 7), it is freely conceded that it is impossible to have an exact correspondence between weight and label. The House Committee on Interstate and Foreign Commerce was of the same view and stated, in effect (Appendix-B, Government's brief, page 33), that if exact correspondence were required the statute would be destructive and prevent the putting of foods in packages. The argument of the Government insisting upon such exact correspondence would therefore make all persons who shipped goods in packages violators of the law. The net is thus set large enough to catch all shippers, leaving it for the courts to step in and say who shall be punished. This is exactly what was condemned by this Court in *United States v. Reese, 92 U. S., p. 214.*

II. The Infirmity of the Act Is Not Cured by Departmental Regulations.

In the discussion contained on pages 10, 11 and 12 of the Government's brief, regulations issued pursuant to the Act are quoted and apparently are relied upon to support this prosecution. An answer to this argument involves an inquiry into the powers of the secretaries of the executive departments of the Government to make regula-

tions to supplement acts of Congress. In this connection we refer to some of the leading cases in this field:

The case of *United States v. United Verde Copper Company, 196 U. S. p. 205*, involved an act of Congress providing for the use of timber on the public lands in Arizona and other states subject to rules and regulations to be prescribed by the Secretary of the Interior. The action was to recover from the copper company for timber alleged to have been cut and removed in violation of the Act and of the regulations. The copper company had removed the timber for the purpose of roasting ore. The United States contended that roasting ore is smelting and that smelting was not a purpose permitted by the Act and was forbidden by the regulations of the Secretary of the Interior. The copper company demurred to the bill and the demurrer was sustained. The judgment was affirmed by the Supreme Court which, in discussing the nature of the regulation made pursuant to the Act by the Secretary of the Interior, said:

> "But the Government relies on the rules and regulations of the Secretary of the Interior promulgated under, as it is contended, the authority of the statute. Since United States vs. Richmond Mining Company was decided, No. 7 of those regulations provides that 'no timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.' By this the Secretary of the Interior may have intended to upset the ruling in United States vs. Richmond Mining Company, but to which industry the roasting of ore shall be assigned the Secretary does not say, and the considerations which we have expressed apply as well to the regulations as to the statute. But there is a more absolutely fatal objection to the regula-

tion. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This we think is beyond his power. Smelting may be a separate industry from mining, but that does not deprive it of the license given by the statute. As we have already said, the general clause 'other domestic purposes' is as much a grant of permission to the industries designated by it to use timber as though they had been expressly enumerated, and their rights are as inviolable as the rights of the industries which are enumerated. The industries meant by the general clause may receive indeed limitation from those enumerated; in other words, be limited to the conditions existing in the mining states and territories when the statute was enacted, but there can be no doubt that smelting has such relation. If Rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term he can another. If he can abridge he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."

In *Morrill, Collector, v. Jones, 106 U. S. 466*, it was held that the Secretary of the Treasury cannot by his regulations alter or amend a law. In this case the Court, in the course of its opinion, said:

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the Collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of superior stock. This is manifestly an attempt to put into

> the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals especially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

United States v. Eaton, 144 U. S. 677, was a case involving the prosecution of a dealer in oleomargarine who failed to keep a book showing the oleomargarine received by him and from whom received, and certain other records as required by regulations made by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. The Court, in discussing the power of the Secretary to make regulations whereby offenses against the United States were sought to be created, referred with approval to *Morrill v. Jones* and, in again applying the rule, went on to say:

> "Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the object of criminal procedure is an act committed or omitted 'in violation of a public law either forbidding or commanding it.' It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue as a needful regulation under the oleomargarine act for carrying it into effect could be considered as a thing required by law in the carrying on or conducting of the business of a wholesale dealer in oleo-

margarine in such a manner as to become a criminal offense punishable under Section 18 of the Act. * * *

"Regulations prescribed by the President and by the heads of departments under authority granted by Congress may be regulations prescribed by law so as lawfully to support acts done under them and in accordance with them and may thus have in a proper sense the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

Williamson v. United States, 207 U. S. 426, was a case where the defendant, Williamson, was prosecuted for conspiracy to suborn perjury, it being charged that he conspired to commit the crime in proceedings for the purchase of public land under the authority of the law commonly known as the Timber and Stone Act. The inquiry of the Court, pertinent to the discussion here, involved the question of whether the affidavit which it was claimed had been falsely made was one required to be made by the Act of Congress. The Court determined that the Act itself did not require the affidavit upon which the prosecution was based, but that such affidavit had been required only by regulation made by the Commissioner of the General Land Office. The Court held that the Commissioner had no power or authority to make this requirement and, among other things, said:

"True it is that in the concluding portion of Section 3 of the Timber and Stone Act it is provided

> that 'effect shall be given to the foregoing provisions of this Act by regulations to be prescribed by the Commissioner of the General Land Office,' but this power must, in the nature of things, be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute and cannot be held to have authorized him by such an exercise of power to virtually adopt rules and regulations destructive of rights which Congress had conferred. * * *."

Compare, also, the recent case of *Burnet, Commissioner, v. Chicago Portrait Company*, decided Feb. 23, 1932, Advance Opinions October Term 1931, where the Court considered the sense in which the term "foreign country" was used in a statute, and held that the regulations of the Commissioner of Internal Revenue in respect of that expression were not in accord with the meaning of the statute, and that such regulations would not be given effect in the case before the Court.

A study of the cases above cited discloses that it is within the power of Congress to vest in executive officers the power to make necessary rules and regulations to enforce the provisions of the law, but that Congress cannot delegate its power to make laws to an executive department or to an administrative officer, nor confer upon any such officer or the courts the power to determine what the rule of law shall be. In fine, Congress must prescribe the rule; details of execution may be established by regulation. In no event can the regulations alter, amend, or go beyond the provisions of the Act. Who is to decide in any given

case whether the regulations exceed proper bounds? If the secretaries have determined upon variations which they consider reasonable, are such determinations conclusive? Who is to say whether the regulations are not themselves unreasonable? Under the cited cases the answer to these questions is that the Court has the right, power and duty to say whether the regulations go beyond the power conferred by Congress. In the instant case, a trial by jury must be had and the question decided by the jury. The jury must determine as a matter of fact whether the variations of weight in the packages shipped are reasonable under the circumstances. This brings the whole problem back to the beginning, namely, whether it is permissible to delegate to the jury the power and duty of determining in any given case as to what acts shall constitute an offense, being guided in its determination by the rule as to whether the acts disclosed are reasonable or unreasonable.

The report of the House Committee on Interstate and Foreign Commerce annexed to the Government's brief as Appendix-B also is in agreement with these views. We quote from this report (page 34 of the Government's revised brief):

> "The bill as reported proposes as to those articles classed as 'food products' under the terms of the pure-food law, that if they shall be in package form the quantity of the contents shall be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, provided, however, that reasonable variations shall be permitted. It is also provided that tolerances shall be established by the Secretary of Agriculture, Secretary of Commerce and Labor, and Secretary of the Treasury by rules and regulations

> in accordance with the general provisions of the pure-food act. Under the terms of the bill reasonable variations are permitted, whether tolerances are or are not established by the rules and regulations, nor will the tolerances established by the rules and regulations be conclusive upon the courts in determining the question of the reasonableness of the variations, but the establishment of tolerances by rules and regulations will undoubtedly be a great aid to the producers of food products in package form by letting them know in advance what the Government officials believe to be reasonable variations. The establishment of tolerances will also be a great aid to the officials both of the General Government and of the States in connection with the enforcement of the law."

It will be noted that a distinction is drawn between reasonable variations permitted by the Act and tolerances which may be established by the regulations. The ultimate determination as to the reasonableness of the variations in a given case is for the court. Tolerances established by the regulations are advisory merely, and are in the nature of directions to the executive officers as regards the standards to be observed by them in initiating prosecutions under the Act.

Assuming, however, that the Government may in this prosecution resort to the regulations as a guide, we would raise the question as to whether it has improved its position. The tolerances established by the regulations are set forth on pages 10 and 11 of the Government's revised brief. Apparently the sacks of cornmeal described in the indictment would be governed by clause (1) and clause (3). In clause (1) an exemption is granted where

error occurs in packing "conducted in compliance with good commercial practice." This involves an inquiry into what is the commercial practice in the field, and implies a distinction between "good" and "bad" practice. In clause (3) an exception is made for discrepancies due to differences in atmospheric conditions in various places, and which result from ordinary and customary exposure of the packages to evaporation or to the absorption of water. The Court may take notice that products such as cornmeal are peculiarly susceptible to variations of this character. The regulations provide that in such cases the reasonableness of the discrepancy "will be determined on the facts in each case." Accepting the regulations as applicable, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. *Connally v. General Construction Company, 269 U. S. 385, 395.*

Finally, we would suggest that the Government in the Court below disclaimed any reliance upon the regulations[1], and this point was not passed upon by the District Court. We would also suggest that there is no assignment of error in the record directed to this point.

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(1) The following is taken from the Government's brief in the trial court: "Departmental regulations. The defendant in his brief argues at great length on the proposition that where a statute is lacking in necessary elements to define a crime, those elements may not be supplied by executive regulation. The Government is relying on no regulation as a basis for the charges brought in the information, nor does the defendant cite any regulation against which it aims its attack. The information is predicated on the provisions of the statute only, and it is respectfully submitted that they are sufficient."

On pages 20-23 of the Government's brief the argument is made that the 6th amendment has no application to this case because a prosecution of an offense under the Food and Drugs Act is not a criminal prosecution within the meaning of that amendment. It is said that a violation of the Food and Drugs Act is at most a petty offense, to the prosecution of which the limitations of the 6th amendment are inapplicable.

In this connection, we would point out that section two of the Act in terms characterizes the violations here complained of as a misdemeanor. At all times, a misdemeanor has been a crime. *United States v. Stevenson, 215 U. S. 190, 199.* The Court also remarked in the *Stevenson* case (page 199) that upon trial of the charge against the defendant he would be entitled to the constitutional protection which requires the Government to produce the witnesses against him. This is one of the rights guaranteed by the 6th amendment; and it would seem to follow that the defendant likewise would be entitled to the protection of the other rights secured by that amendment. The prosecution here is based upon an indictment containing nine counts, and the defendant is exposed to the possibility of the imposition of fines aggregating $1800.00. For subsequent offenses the statute provides that the penalty may be a fine of $300.00 or imprisonment not to exceed one year, or both, in the discretion of the Court.

We would further invite consideration of the Court to the proposition that if this prosecution is not a "criminal prosecution" within the meaning of the 6th amendment, it

would appear to follow as a matter of course that it is not a "criminal case" within the meaning of the Act of March 2, 1907, c. 2564, 34 Statutes 1246 *(U. S. C. Title 18, Sec. 682)*, upon which the jurisdiction of this court depends. If the argument of the Government should prevail, therefore, the result must be a determination that this appeal has been improvidently allowed, and should be dismissed.

This point is now raised by the Government for the first time. It is not made the subject of any assignment of error, nor was it passed upon by the trial court. As the Criminal Appeals Act contemplates vesting in this court jurisdiction only to review the particular question decided by the court below, the point is not now open to consideration by this Court. *United States v. Stevenson, 215 U. S. 194, 196.*

III.

The Act also is in conflict with Articles 1, 2 and 3 of the Constitution separating the Government into legislative, executive and judicial divisions, if its provisions in Section 3 authorizing the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce to make regulations are to be given the scope and effect now contended for by the Government. If Congress itself has failed to define a crime, it cannot empower the secretaries in the executive departments of the Government to do so. If the regulations be not relied upon, the Act is equally objectionable on this score in that it leaves the de-

termination of what shall constitute an offense to the court and jury in each case. *United States v. Reese, 92 U. S. 214; Cline v. Frink Dairy Company, 274 U. S. 445; United States v. United Verde Copper Company, 196 U. S. 205; Morrill, Collector, v. Jones, 106 U. S. 466; United States v. Eaton, 144 U. S. 677.*

Conclusion.

The judgment of the District Court is right and should be affirmed.

Respectfully submitted,

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October, 1932.